

## SUPREME COURT

## Respondent's Notice

Supreme Court record number	2018/000068
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**[Title and record number as per the High Court proceedings]**

Data Protection Commissioner	V	Facebook Ireland Limited and Maximilian Schrems
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High Court Record No.	2016/4809P
Date of filing	24 May 2018
Name of Respondent	Maximilian Schrems
Respondent's solicitors	Ahern Rudden Quigley
Name of Appellant	Facebook Ireland Limited
Appellant's solicitors	Mason Hayes & Curran

## 1. Respondent Details

Where there are two or more respondents by or on whose behalf this notice is being filed please also provide relevant details for those respondent(s)

Respondent's full name	Maximilian Schrems
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The Respondent was served with the application for leave to appeal and notice of appeal on date

11 May 2018

The Respondent intends :

to oppose the application for an extension of time to apply for leave to appeal

not to oppose the application for an extension of time to apply for leave to appeal

to oppose the application for leave to appeal

not to oppose the application for leave to appeal

to ask the Supreme Court to dismiss the appeal

to ask the Supreme Court to affirm the decision of the Court of Appeal or the High Court on grounds other than those set out in the decision of the Court of Appeal or the High Court

Other (please specify)

If the details of the Respondent's representation are correct and complete on the notice of appeal, tick the following box and leave the remainder of this section blank; otherwise complete the remainder of this section if the details are not included in, or are different from those included in, the notice of appeal.

Details of respondent's representation are correct and complete on notice of appeal:

Respondent's Representation

Solicitor			
Name of firm			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode		Ref.	
<b>How would you prefer us to communicate with you?</b>			
<input type="checkbox"/>	Document Exchange	<input checked="" type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

Counsel			
Name			
Email			
Address		Telephone no.	
		Document Exchange no.	
Postcode			

**If the Respondent is not legally represented please complete the following**

Current postal address
Telephone no.
e-mail address

<b>How would you prefer us to communicate with you?</b>			
<input type="checkbox"/>	Document Exchange	<input type="checkbox"/>	E-mail
<input type="checkbox"/>	Post	<input type="checkbox"/>	Other (please specify)

2. Respondent's reasons for opposing extension of time

<b>If applicable, set out concisely here the respondent's reasons why an extension of time to the applicant/appellant to apply for leave to appeal to the Supreme Court should be refused</b>
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3. Information about the decision that it is sought to appeal

**Set out concisely whether the respondent disputes anything set out in the information provided by the applicant/appellant about the decision that it is sought to appeal (Section 4 of the notice of appeal) and specify the matters in dispute:**

1. Save as hereinafter set out, the Respondent takes no issue with the matters set out in paragraphs 1 to 5 in Section 4 of the Application for Leave. For the reasons stated by the High Court judge in her judgement of 2 May 2018, the Respondent does not agree that Facebook give sufficient prominence in its submissions before the High Court to the imminent repeal of the Data Protection Directive.
2. The Respondent takes no issue with the matters set out in paragraph 6 in Section 4 of the Application for Leave, save insofar as he reserves the right to refer to the Judgment for the full terms of the findings of fact as made by the High Court;
3. Paragraph 7 in Section 4 of the Application for Leave accurately states the case that is made by Facebook, but the Respondent for reasons that are set out below disagrees that the High Court made insufficient findings as to the alleged oversights and safeguards and/or that insufficient weight was attached to same

4. Respondent's reasons for opposing leave to appeal

**If leave to appeal is being contested, set out concisely here the respondent's reasons why:**

**Jurisdiction to Hear and Determine Appeal from the High Court**

1. The Respondent agrees with the Applicant that the first issue requiring a determination by this Honourable Court is whether, in fact, any appeal lies from a decision of the High Court to refer a question to the CJEU pursuant to Article 267 TFEU.
2. In response to the points made at paragraphs 4 to 11 in Section 5 of the Application for Leave, the Respondent, at the outset, submits that the decision in *Campus Oil v Minister for Industry and Energy* [1983] I.R. 82 precludes an appeal from a decision to make a reference to the CJEU, that it represents good authority in this jurisdiction, and that it ought not be disturbed.
3. Further, as is obliquely noted by the Applicant in Section 5 of the Application for Leave, the decision of the Trial Judge has no direct legal effect on the Applicant; it is only the determination of the CJEU that will / may be determinative. On this further basis, the rationale and reasoning underpinning the decision in *Campus Oil* need not be disturbed.
4. Further to the above, while it is the case that the CJEU in its decision in *Cartesio* has emphasised the permissibility under Union law for Member States to provide for an appeal mechanism in respect of a decision to refer a matter for the determination of the CJEU, it is not authority for the proposition that it is a *requirement* that Member States allow for such appeals. Thus, *Cartesio* does not disturb the reasoning or applicability of *Campus Oil*, nor does it compel this Court to permit any such appeal.
5. In addition, *Cartesio* reiterates that any appeal mechanism which may be available in the Member States, and which may permit the making of a finding adverse to that made by the Referring Court, cannot affect or interfere with the right and obligation of

the Referring Court in relation to making or maintaining the reference. In particular, *Cartesio* provides that the Referring Court's obligation to refer remains independent and outside of the national court structure, and in particular that it is to the Referring Court alone "to come to a conclusion as to whether it is appropriate to maintain the reference for a preliminary ruling, or to amend it or to withdraw it." In the premises, even if the Supreme Court determines that an appeal is in principle permissible, the effect of *Cartesio* is that the Supreme Court cannot this any Order which interferes with the High Court's making or maintenance of the reference. On this basis, the Supreme Court ought not grant leave to appeal in relation to the Order sought at paragraph 6, Section 8 of the Application for Leave requiring / directing amendment of the Reference, or any such Orders.

6. In response to the more general points made at paragraphs 2 and 3 of Section 5 of the Application for Leave, the Respondent does not agree that the High Court judge made errors with regard to US law. The basis for the Judgment and Statement of Facts was the evidence presented to the Court over the course of the Hearing. That consisted to a very significant degree of oral evidence, which was a matter for the High Court to weigh and assess. The High Court has determined the facts established on the balance of probability pursuant to same, and the Applicant has already failed, in an application for "corrections and/or amendments" to the Judgment, to establish on a preponderance of the evidence before the High Court that the learned Trial Judge fell into error. It is submitted that the learned Trial Judge fell into no or no serious error in reaching the impugned conclusions, as alleged by the Applicant herein.
7. Before the High Court, the Respondent argued, on quite different grounds from those advanced by Facebook, that it was not appropriate for reasons of European Law to make a reference to the CJEU. The reference made by the High Court includes questions directed to the correctness of the arguments advanced by the respondent before the High Court. The Respondent will make such submissions as may be appropriate in this regard before the CJEU. The respondent is anxious to obtain the decision of the CJEU on those issues, and under those circumstances wishes the reference to proceed.

#### **Suitability for Direct Appeal to Supreme Court**

8. As stated by Facebook at paragraph 13 of Section 5 of the Application for Leave, the question of whether there is an appeal from the decision to refer is one that can be made only by the Supreme Court.
9. The Respondent does not however agree that, otherwise, the constitutional criteria for a leapfrog appeal on the substance of the issues determined by the High Court are met. The substantive appeal in essence raises questions of fact, and not questions of law at all. The fact that the issue is important, or that it may affect many people, does not mean that the interests of justice require an appeal. The same could be said of very many judicial review applications. The Respondent therefore takes issue with the basis for the application for leave to appeal directly to the Supreme Court as advanced by the Applicant in paragraphs 14 and 15 in Section 5 of the Application for Leave.

5. Respondent's reasons for opposing appeal if leave to appeal is granted

Please list (as 1, 2, 3 etc in sequence) concisely the Respondent's grounds of opposition to the ground(s) of appeal set out in the Appellant's notice of appeal (Section 6 of the notice of appeal):

**Ground One**

1. It is submitted that the learned Trial Court Judge did not fail to have adequate regard for the Privacy Shield Decision and, as matter of fact, has sought an answer from the CJEU as to the effect of same on the matters raised in suit, and in particular as to whether the Court is bound by the Privacy Shield Decision. It is inapposite and unnecessary for the Applicant to seek to obtain from this Honourable Court a question as to the import and effect of a Commission Decision, when the learned High Court Judge has sought to obtain a definitive answer from the CJEU as to same. It is clear from *Schrems v Data Protection Commissioner Case C\_362/14 EU:C:2015:650* that it is only the CJEU who may provide the answer to same. On this further basis this ground of appeal ought be rejected by this Honourable Court.
2. In this regard, it is further noted that the CJEU in *Schrems* expressly provided that it must be open to a national court or authority to question a Commission Decision or other Union Instrument, and to refer that question to the CJEU for an answer. The Applicant ought not be permitted to block such a question being referred where same is relevant to the ultimate determination and has been expressly raised by the Applicant itself.

**Ground Two**

3. It is submitted that the repeal of Directive 95/46/EC and its effect is not something that was pressed upon the High Court at any time during the course of the hearing, other than in the oblique manner as noted by the learned Trial Judge in her judgment of 4 May, 2018. It was not a matter that was advanced as a central argument by the Applicant at any point prior to its application for a stay on the reference before the High Court. Furthermore, all of the parties in the course of the hearing made primary reference to and relied on the Directive, not the GDPR. The Applicant ought not now be permitted to interfere with the well-reasoned judgment of the High Court by reliance on a point not pressed before, or on arguments it chose not to advance. In addition, as noted by the Applicant, the repeal of the Directive does not repeal the SCC decisions, with which the High Court and CJEU are primarily concerned. Finally, the Applicant may advance any such arguments before the CJEU. Subject to the views of the CJEU, it is not *prima facie* precluded from so doing. On this basis an appeal on this ground is wholly unnecessary.

**Ground Three**

4. It is submitted that the learned High Court Judge's findings as to the carrying out of "mass indiscriminate processing" in the United States are supported by evidence put before her, that she was entitled to make such a finding on such evidence, and this finding ought not therefore be disturbed by this Honourable Court.

**Ground Four**

5. This finding of the Court was subjected to rigorous examination in the course of the Applicant's application for "corrections and amendments" to the Judgment, and the learned High Court Judge was satisfied that the evidence supported the conclusions of fact that were set out in the Judgment. The Respondent submitted that this finding of fact is supported by the evidence adduced at the hearing, that it was open to the learned Trial Judge, on the balance of probabilities, to make this finding as to fact, and further submits that it ought not be disturbed.
6. Further to the above, it is submitted that it is irrelevant whether such a finding is

“damaging”; the Court’s function is not to protect the parties but to reach determinations based on the evidence before it.

7. In addition, insofar as this finding is in tension with the Privacy Shield decision, it is submitted that it is *inter alia* conflicts such as this that the learned Trial Judge seeks to have determined by the CJEU by way of the reference made.

#### **Grounds Five, Six, Seven and Eight**

8. These were primarily matters of contention between the Applicant and the Data Protection Commissioner at the hearing of the action and the subsequent hearings, and the Respondent therefore believe they remain primarily matters of contention as between those parties. Nevertheless, it was clearly open to the learned Trial Judge on the evidence to reach the conclusions as set out in her Judgment and impugned by the Applicant herein, and those conclusions were correct.

#### **Ground Nine**

9. It is submitted that the learned Trial Judge did not fail into error by failing to consider relevant matters as suggested by the Applicant. In particular, it is to be noted that the Applicant stressed the national security issues to the High Court in its submissions in the course of the hearing, and further emphasised the purported necessity for the surveillance carried out on the Respondent’s data upon transfer to the United States. The Applicant referred to and relied on evidence presented by it, and the learned Trial Judge has sought answers from the CJEU as to what is the correct consideration for a Court in considering potential infringements, be it law or practice, and again it is to the CJEU to determine the answer to this question.

10. Further, the economic significance is of limited weight to the question of the infringement on the Respondent’s fundamental rights under the Charter, particularly where it may be determined that the basis for the breaches of those rights is incompatible with those rights and ought be struck down. If, as alleged, the learned Trial Judge attributed less weight to the economic significance of impugned Union Instruments than to EU citizen’s rights, then it is submitted that the correct approach was adopted.

11. In addition, it is anticipated that the Applicant, regardless of the outcome of the within appeal, intends to raise issues relating to national security and economic interests before the CJEU, and that such attempt to rely on them in the within appeal is duplicative and intended only to burden this Court with additional, irrelevant material so as to delay and frustrate a final determination of the questions in suit.

#### **Ground Ten**

12. It is submitted that this particular language is adopted directly from the relevant provision of United States law governing the circumstances in which “foreign intelligence” may be gathered. On this basis, it is submitted there is no error in the question posed in the reference.

#### **Grounds Relating to Refusal of Stay on Reference**

13. For the reasons set out above, it is submitted that the learned Trial Judge did not err in refusing the reliefs sought in the Applicant’s application for a stay on the reference.

14. It is further submitted that it was open to the learned Trial Judge to take appropriate inferences as to the Applicant’s conduct of the case from its raising, at this late stage, a matter not stressed before the Court, and which is now relied on to defeat the entire proceeding. It was open to the Court to infer from same that the Applicant was simply seeking to case further delay in its application for a stay, and that the learned

High Court Judge was entitled to rely on such inference.

15. The learned Trial Judge did not err in refusing the orders sought, nor in granting the Respondent his costs of the application.

**Name of counsel or solicitor who settled the grounds of opposition (if the respondent is legally represented), or name of respondent in person:**

Seán O’Sullivan B.L. / James Doherty S.C. / Eoin McCullough S.C.

6. Additional grounds on which decision should be affirmed

**Set out here any grounds other than those set out in the decision of the Court of Appeal or the High Court on which the Respondent claims the Supreme Court should affirm the decision of the Court of Appeal or the High Court:**

Are you asking the Supreme Court to:

**depart from (or distinguish) one of its own decisions?**

Yes

No

If Yes, please give details below:

**make a reference to the Court of Justice of the European Union?**

Yes

No

If Yes, please give details below:

**Will you request a priority hearing?**

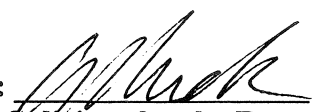
Yes

No

If Yes, please give reasons below:

The Respondent joins in the Applicant’s application for a priority hearing in circumstances where he seeks to avoid any further delay in the progress of the within proceedings, which is now the subject of a reference to the CJEU.

Signed:



**Solicitor for the Respondent**

Please submit your completed form to:

**The Office of the Registrar to the Supreme Court  
The Four Courts  
Inns Quay  
Dublin**

**This notice is to be lodged and served on the appellant and each other respondent within 14 days after service of the notice of appeal.**